SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1939.

NO.....

STATE OF MISSOURI BY AND THROUGH THE UNEMPLOYMENT COMPENSATION COMMISSION AND HARRY P. DRISLER, TREASURER, *Petitioner and Appellant below,*

vs.

WARREN S. EARHART, TRUSTEE IN BANKRUPTCY FOR BURNAP-MEYER, INC., *Respondent and Appellee below.*

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The Opinion of the Court Below.

The opinion of the United States Circuit Court of Appeals for the Eighth Circuit was filed on the 2nd day of May, 1940, and is to be found at page 32 et seq. of the transcript. Said opinion has not been officially reported.

II.

Grounds on Which Jurisdiction is Invoked.

The date of the judgment to be reviewed is May 2, 1940 (Tr. 32). A petition for a rehearing, filed by this petitioner in the United States Circuit Court of Appeals, was by said Court denied on May 24, 1940 (Tr. 49).

This petition for review on writ of certiorari is made upon authority of Section 240 of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. A. 347) (Appendix p. 38).

Since this Court's jurisdiction is dependent upon the discretion of the Court and not upon the nature of the claims

advanced and the rulings made thereon, the facts showing the reasons why this court should exercise its supervisory powers are not summarized under this heading. The petitioner believes however that there are special and important reasons why this writ should be granted. These have already been stated in the preceding petition under II (pp. 8 to 10), and are discussed under the headings of "Statement of the Case" and "Argument."

Inasmuch as the foregoing statute clearly confers on this Court jurisdiction to review by certiorari the opinion of a circuit court of appeals in any case civil and criminal, it appears unnecessary to brief this question. The following case is believed to sustain said jurisdiction.

Magnum Import Company vs. *Coty* (N. Y. 1923), 262 U. S. 159, 67 L. Ed. 922, 43 S. Ct. 531.

III.

Statement of the Case.

This has already been stated in the preceding petition under I (pp. 3 to 8), which is hereby adopted and made a part of this brief.

IV.

Specification of Errors.

1. The Court erred in holding that contributions in the amount of $530.09 held to be due for the period beginning January 1, 1937, and ending June 16, 1937, could not be collected by petitioner and in holding that the appellee was injured and was in a position to raise a constitutional question.

2. The Court erred in failing to give effect to Section 6 (C) (d) of the Missouri Unemployment Compensation Law.

3. The Court erred in failing to order the payment of interest from the dates upon which contributions became due to date of payment.

4. The Court erred in refusing to determine whether or not contributions exacted under the Missouri Unemployment Compensation Law are taxes within the meaning of the Bankruptcy Act and required to priority because of Section 124a, 28 U. S. C. A.

V.

Summary of Argument.

1.

The judgment of the lower Court holding Respondent Appellee not liable to pay contributions claimed is erroneous because (a) The Missouri Unemployment Compensation Law does not levy a retroactive tax contrary to the Missouri Constitution because the application of that law to employers liable to the tax on employers of eight or more under Title IX of the Social Security Act does not increase the tax liability of such taypayers. (b) The Missouri Unemployment Compensation Law is to be construed prospectively and so construed levies a tax for any part of the year 1937, the amount of which is computed at 1.8% of the 1937 payroll. (c) The general application of the Missouri Unemployment Compensation Law does not under any construction bring about the general collection of a retroactive tax. All taxpayers of the class to which Respondent Appellee belongs are liable for the payment of a 2% tax on their 1937 payroll to the Federal Government under a law permitting such taxpayers to credit their State tax payment of 1.8% of their 1937 payroll against the Federal tax. This is the general operation and construction of the two taxing laws. Merely because of the unusual situation of this particular taxpayer (resulting from the erroneous order of the Referee) this court on a basis of prior decisions will not hold the Missouri Law unconstitutional as being retrospective in operation. (d) Because if the allowance of Petitioner Appellant's claim could by any construction be construed to increase the tax liability of the Respondent Appellee, such result has been brought about solely by the failure and refusal of the Respondent Appellee to obey the specific mandate of Section 124a, Title 28, U. S. C. A.

2.

Contributions claimed are properly due under Section 6 (C) (d) of the Missouri Unemployment Compensation Law which levies a tax on all employers of the class to which Respondent Appellee belongs, equal to 90% of the tax levied under appropriate Federal Tax Law and against which the state tax is credited.

3.

The lower Court erred in denying Petitioner Appellant's claim for interest upon the contributions or taxes due because ruling decisions of this court specifically require the payment of interest on tax obligations. This is especially true or should be especially true in the case of tax obligations which accrue while the business is being operated under the supervision of the Federal Court and it is immaterial that there are insufficient funds to pay administrative expenses in full.

4.

The lower court erred in failing to determine that petitioner's claim was for a tax because it is an involuntary exaction collected for a public purpose by the sovereign power; it is immaterial that procedure for its collection might be different from that provided for other taxes or that it might be identified by the term "contributions," and being a tax, interest should have been allowed and it should have been ordered paid as an administrative expense entitled to priority over other administrative expenses for the reason that Section 124a, Title 28, U. S. C. A. specifically directs the Respondent Appellee to pay these contributions or taxes as an individual or corporation.

VI.

Argument.

1.

The Court erred in denying that contributions are due for the year 1937 prior to June 17, 1937, the day the law was approved and in holding that the appellee was injured and was in a position to raise a constitutional question.

In July 1935, the Federal Social Security Law was passed. Section 901, 42 U. S. C. A. 1101, reads as follows:

> "On and after January 1, 1936, every employer * * * shall pay for each calendar year an excise tax, with respect to having individuals in his employ, equal to the following percentages of the total wages * * * payable by him * * * with respect to employment * * * during such calendar year:
>
> "(1) With respect to employment during the calendar year 1936 the rate shall be 1 per centum;

"(2) With respect to employment during the calendar year 1937 the rate shall be 2 per centum;

"(3) With respect to employment after December 31, 1937, the rate shall be 3 per centum."

Credit was allowed against the Federal tax for taxes paid to states having approved unemployment compensation laws. (Soc. Sec. Act, Section 903 (a), Appendix p. 39.) Section 902, 42 U. S. C. A. 1102, provided for this credit:

"The taxpayer may credit against the tax imposed by section 901 the amount of contributions, with respect to employment during the taxable year, paid by him (before the date of filing his return for the taxable year) into an unemployment fund under a State law. The total credits allowed to a taxpayer under this section for all contributions paid into unemployment funds with respect to employment during such taxable year shall not exceed 90 per centum of the tax against which it is credited, and credit shall be allowed only for contributions made under the laws of States certified for the taxable year as provided in section 903."

Section 903 (a), 42 U. S. C. A. Sec. 1103 (quoted in appendix at p. 39), sets out the requirements which state laws must meet to obtain approval of the Federal Social Security Board.

In 1939, Section 902 (a) (3), 42 U. S. C. A. 1102, note, was amended to read as follows:

"(a) Against the tax imposed by section 901 of the Social Security Act for the calendar year 1936, 1937, or 1938, any taxpayer shall be allowed credit for the amount of contributions, with respect to employment during such year, paid by him into an unemployment fund under a State law—

"(3) Without regard to the date of payment, if the assets of the taxpayer are, at any time during the fifty-nine-day period following such date of enactment, in the custody or control of a receiver, trustee, or other fiduciary appointed by, or under the control of, a court of competent jurisdiction."

On June 17, 1937, the Missouri Unemployment Compensation Law was approved by the Governor and became law. This law met the requirements and was approved by the Board on July 13, 1937.

Section 6 (A) (1) of the Missouri Law, Laws of Missouri, 1937, p. 585, reads in part as follows:

> "On and after January 1, 1937, contributions shall accrue and become payable by each employer for each calendar year in which he is subject to this Act, with respect to wages payable for employment (as defined in Section 3 (i)) occurring during such calendar year. * * * "

Burnap-Meyer, Inc. was an employer within the meaning of Title IX of the Federal Social Security Act and became liable for taxes for the years 1936, 1937 and 1938. It was required to pay the entire amount of the tax based upon wages payable to Missouri employees during the year 1936 to the Federal Government because Missouri had no unemployment compensation law and there were no contributions to credit against the Federal tax. In 1937 it became liable under the Missouri Unemployment Compensation Law.

A Federal statute, Section 124a, Title 28, U. S. C. A. (Act of June 18, 1934), which reads:

> "Any receiver, liquidator, referee, trustee, or other officers or agents appointed by any United States Court who is authorized by said court to conduct any business, or who does conduct any business, shall, from and after June 18, 1934, be subject to all state and local taxes applicable to such business the same as if such business were conducted by an individual or corporation. * * * "

required the bankrupt operating under owner-management or its trustee to pay State and local taxes.

The United States Circuit Court of Appeals held that contributions in the amount of $530.09, based upon wages payable during the year 1937 prior to June 17, 1937, the date of the approval of the Act, could not be collected, because the law insofar as it exacts a tax for this period is unconstitutional.

The Court based this finding on Article II, Section 15 of the Missouri Constitution, which reads:

> "That no ex post facto law, nor law impairing the obligation of contracts, or retrospective in its operation, or making any irrevocable grant of special privileges or immunities, can be passed by the General Assembly."

It cited the case of *Smith* vs. *Dirckx*, 283 Mo. 188, 223 S. W. 104, 11 A. L. R. 510, in support of this finding. The facts in the Dirckx case are not the facts in the Burnap-Meyer Inc. case, and, therefore, the decision in the Dirckx case is not controlling here. In the Dirckx case, the statute in question which became effective in May, 1919, imposed a new obligation in that the rate of the tax was to be increased from one-half of one per cent to 1½ per cent and therefore the court held that the higher rate could not be applied to income received during that portion of 1919, prior to May. It is important to note, however, that the Court permitted the tax to be collected for this period at the rate of one-half of one per cent, as imposed by the old law, even though the old law had been repealed. The Court permitted the old obligation to stand. Would not the same Court permit the old obligation to stand in the Burnap-Meyer case? No new obligation is created if the trustee performs his duties properly and complies with State and Federal laws.

The Circuit Court of Appeals also cited the cases of *State ex rel. Koeln* vs. *Southwestern Bell Telephone Co.*, 316 Mo. 1008, 292 S. W. 1037, and *Graham Paper Co.* vs. *Gehner*, 332 Mo. 155, 59 S. W. (2d) 49. These cases also dealt with income taxes.

Here, however, we are concerned with a tax of an entirely different character. As was said in *United States* vs. *Glenn L. Martin Co.*, 60 S. Ct. 32, 33; 84 L. Ed. 51:

> "But the Social Security Act imposes upon every employer 'an excise tax, with respect to having individuals in his employ.' And employment in that act 'means any service, of whatever nature, performed within the United States by an employee for an employer * *' with exceptions not material here. This excise has been represented as one levied 'upon the relation of employment,' and upon 'the right to employ' and as a payroll tax. It is

> not—as taxes upon the privilege of selling, manufacturing or processing characteristically are—measured by the value of the privilege taxed, or by either quantity or price of what is manufactured, processed or sold. A tax on the processing or sale of an article, while an excise, commonly would be denoted a tax 'on' the article processed or sold. * * * And a tax 'on' the relationship of employer-employee—characterized as a tax on payrolls—is not of the type treated by the contract as a tax 'on' the goods or articles sold."

In the instant case, no question of retroactivity is involved. The Legislature apparently intended for the Act to have an entirely prospective effect. This intention is found in Section 6 (C) (d) (Appendix, p. 40) which imposes additional contributions not with respect to any particular wages paid but rather with respect to contributions not otherwise payable under the Act. So construed, the law levies a tax for that part of the year 1937 remaining after its effective date and its only relation to a time antecedent is to use the amount of wages payable during the first part of 1937 as a basis upon which to compute the tax. *Cooley on Taxation* (4th Ed.) Sec. 523, p. 1157, discusses retrospective taxation as follows:

> "In apportioning the tax between individuals there is no valid objection to making it on consideration of a state of things that may now have come to an end; as where a tax is imposed on the extent of one's business for the preceding year instead of upon an estimate of the business for the year to come."

A view similar to that of Mr. Cooley has been expressed by Courts of states which have constitutional inhibitions against retrospective legislation. *Carroll* vs. *Wright*, 131 Ga. 728, 63 S. E. 260; *Page* vs. *Samson*, 184 Ga. 623, 192 S. E. 203; *Cadena et al.* vs. *State ex rel. Leslie, et al.* (Tex. Civ. App.), 185 S. W. 367; *American Refrigerator Transit Co.* vs. *Adams*, 28 Colo. 119, 63 Pac. 410; *McClellan* vs. *Railway Co.*, 11 Lea (Tenn.) 336.

People vs. *Spring Valley Hydraulic Gold Co.*, 92 N. Y. 383, involved a statute which was passed in June, 1880, providing that a tax should be imposed upon certain corporations and

payable on January 1, 1881. The statute further provided that on November 1 of 1880 all such corporations should file a return, stating therein the amount of the dividends declared by such corporations during the year immediately preceding November 1, 1880, and that a tax based upon the payment of such dividends should be levied and collected on January 1, 1881. In deciding that case the Court of Appeals of New York said: l. c. 390.

> "It is claimed by the defendant that if the statute is construed as requiring corporations to make a report in November, 1880, and to pay a tax under the act in January, 1881, it necessitates giving a retrospective effect to the act, which is contrary to principle and the accepted canons of construction. But we are of the opinion that this objection is not well founded. * * * The tax was in no just sense the imposition of a burden for past transactions, or a tax on franchise or business prior to June 1, 1880. The fact that the amount of the tax may in some cases be fixed by reference to the business of the company during the year does not make the act retrospective. The burden it imposes is future and for future expenditures. It is competent for the legislature to adopt such method of valuing the franchise or property of corporations for the purpose of taxation as it deems proper."

The decision in this case was followed in *People* vs. *Goldfogle*, 205 N. Y. St. 870, l. c. 876, and a similar ruling was made in *Drexel & Co.* vs. *Commonwealth*, 46 Pa. St. 31.

The rule is well settled in this state that unless a different intent is evident beyond reasonable question, statutes must be construed as having a prospective operation only. *State* vs. *Public Service Commission*, 317 Mo. 172, 295 S. W. 86; *Cranor* vs. *School District No. 2*, 151 Mo. 119, 52 S. W. 232. Accordingly, appellants urge the acceptance of the prospective construction suggested.

Even if the Court should find that in respect to some employers, for example, employers who are not covered by Title IX of the Federal Act, the Missouri Law is retroactive in operation, this bankrupt has no right to raise the objection. It is a well-established principle that an individual who alleges the unconstitutionality of a statute must show beyond doubt,

not only that the law is unconstitutional but also that the statute in its operation injures him. This rule is recognized and declared in the following cases:

Cofer vs. *Riseling*, 153 Mo. 633, 55 S. W. 235;
Lige vs. *Chicago B. & O. Railway Company*, 275 Mo. 249, 204 S. W. 508;
Stouffer vs. *Crawford*, 248 S. W. 581;
Bourjois vs. *Chapman*, 301 U. S. 183, and the cases there cited, 11 Am. Jur. 748, 81 L. Ed. 1027, 57 S. Ct. 675.

Furthermore, it is a fundamental principle that the judiciary will not pass upon the validity of acts of the legislature except at the suit of one who in a case or controversy shows that he will be adversely affected by the particular feature of the legislative act of which he complains. This doctrine is expressed by Mr. Justice Sutherland of the United States Supreme Court in the following language:

> "We have no power per se to review and annul acts of Congress on the ground that they are unconstitutional. That question may be considered only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act. Then the power exercised is that of ascertaining and declaring the law applicable to the controversy. It amounts to little more than the negative power to disregard an unconstitutional enactment, which would otherwise stand in the way of the enforcement of a legal right. The party who invokes the power must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement; and not merely that he suffers in some indefinite way in common with people generally." *Massachusetts* vs. *Mellon*, 262 U. S. 474, p. 488, 67 L. Ed. 1078, 43 S. Ct. 597. See also *Alabama Power Company* vs. *Ickes*, 302 U. S. 464, 58 Sup. Ct. Rep. 300, which cites the case of Massachusetts vs. Mellon.

The Missouri Constitution does not render the Unemployment Compensation Law invalid per se. Its validity cannot be questioned unless there is an injury. Burnap-

Meyer, Inc. received no injury. It was entitled to credit against the Federal tax the amount claimed by the State, and it knew it. Its tax burden was not increased.

The facts and the principle involved in this case are similar to those in the case of *In re Knowles*, 295 Pa. 571, 145 Atl. 797, 63 A. L. R. 1086. In that case, the Pennsylvania Supreme Court—despite the fact that a State inheritance statute imposed progressive rates, which the court assumed was contrary to the State Constitution—held that a taxpayer, because not adversely affected thereby, could not challenge his liability for a state tax equal to the excess of the credit allowed against the Federal Estate tax by Section 301 (b) of the Federal Revenue Act of 1926 over the inheritance taxes paid under other laws of Pennsylvania and to other states. The Court said: l. c. 590.

> "It is unnecessary to continue the discussion along this line (alleged invalidity of the state statute), however, for none of the points of attack against the Act of 1927, made by appellants, are involved in this case, since, as before said, appellants are in no wise injured by any provision of that statute; indeed, so far as the main feature of this act is concerned, it is difficult to perceive how it can harm anyone taking estates or having an interest in estates taxes thereunder, because, in each instance, if the additional tax created by the act was not paid to the commonwealth, the same amount would have to be paid to the national government, and, when paid to the commonwealth, the amount in question is allowed by the national government to the estate making the payment. As this court said in *Gentile* vs. *Railroad Company* (274 Pa. 335, 118 Atl. 223), it is of no moment to complainant whether the amount to be paid goes to one person or another, so long as his liability is not prejudicially altered; the same principle applies here."

The justices of the Supreme Court of New Hampshire, when, by resolution of the House of Representatives they were asked to give an opinion as to the constitutionality of a certain bill, on March 3, 1931, expressed this same principle:

> "The bill provides for the imposition of a tax upon property passing by will or inheritance in such an amount as

will make the total of such taxes laid by states, etc., equal to the amount deductible from the federal estate tax, because so laid.

"It makes the imposition of the proposed tax dependent upon the right to deduct the same from the amount of the Federal estate tax, which would otherwise be payable in full to the Federal Government. We are unable to perceive wherein such a provision would violate any constitutional right of the taxpayer. The amount he is called upon to contribute for the support of government is not increased because he has to pay this state tax.

"The nation lays a valid tax and makes valid provision for its partial distribution to the several states, through the process of local assessments and the deduction thereof from the Federal tax. Substance, not form governs in these matters, and this is the substance of the whole transaction.

"It is our opinion that if the bill is enacted it will be a valid law." *In re Opinion of the Justices*, 85 N. H. 572, 573; 154 Atl. 633 (1931).

It is also important in determining whether or not the objecting party is injured to consider the extent to which the taxpayer may have reasonably anticipated the imposition of the tax. This law was no surprise to the bankrupt. Congress by enacting Title IX of the Federal Act and by providing for credit had invited the States to pass unemployment compensation laws. One after another every State in the Union passed an Unemployment Compensation Law.

The United States Circuit Court of Appeals, however, reached a different conclusion. It said that since the Federal Government filed a claim for the entire amount due under Title IX for the year 1937, since the Referee made an order allowing only 10% and since the Federal Government did not appeal it has now lost its right to appeal and to make an additional claim for the additional tax which is undoubtedly due either to the Federal Government or the State of Missouri. It is obvious that the Federal Government failed to appeal from the order of the Referee in the instant case on the presumption that the 90% would be paid to the State. The Federal Government was unaware of the fact that a court

would find that it had relinquished its rights. If Federal Courts in the Eighth Circuit are to follow the decision, which they are bound to do, the Federal Government can never safely ask the Court to pass upon its claim until after the claim to the State is allowed and paid. If the Court should allow the Federal claim in the amount of only 10% as it did in this case, the Federal Government will always be required to appeal or lose its right to claim the additional amount.

In view of the fact that the court found that the Federal Government is now barred from collecting the remainder of the tax, the court further found that the bankrupt estate would be injured if it had to pay a tax to the State of Missouri and therefore, since there is an injury, it does have the right to raise the constitutional objection.

The court has based its finding that there is an injury and, therefore, that the law is retrospective in operation and unconstitutional on a freak situation—one that was never contemplated in the operation of the law. A law must be judged not by its effect in an isolated case, but by its general application and its effect when it operates as the taxing authorities intended. The law was never meant to operate in such a way as to permit the trustee to get out of paying this tax. The injury has resulted from an erroneous order of the referee and not because of any defect in the law. An isolated harsh application of a generally valid law is of no moment, the rule being that if a law is generally reasonable, an unfair result in a particular case may be disregarded. *Powell* vs. *Pennsylvania*, 127 U. S. 678, 32 L. Ed. 253, 8 S. Ct. 1257; *Olis* vs. *Parker*, 187 U. S. 192, 47 L. Ed. 323, 23 S. Ct. 168; *Hebe Co.* vs. *Shaw*, 248 U. S. 297, 63 L. Ed. 255, 39 S. Ct. 125; *Pierce Oil Corporation* vs. *Hope*, 248 U. S. 498, 63 L. Ed. 381, 39 S. Ct. 172; *Ruppert* vs. *Caffey*, 251 U. S. 264, 64 L. Ed. 260, 40 S. Ct. 141; *National Prohibition Cases*, 253 U. S. 350, 64 L. Ed. 946, 40 S. Ct. 486; *Everard's Breweries* vs. *Day*, 265 U. S. 545, 68 L. Ed. 1174, 44 S. Ct. 628; *Euclid* vs. *Ambler Co.*, 272 U. S. 365, 71 L. Ed. 303, 47 S. Ct. 114; *Lambert* vs. *Yellowley*, 272 U. S. 581, 71 L. Ed. 422, 47 S. Ct. 210. Should the courts hold that a law, which is fair in its general operation, is unconstitutional merely because, due to an erroneous order, an injury occurs in an isolated case?

Should the court shield one who claims that a law injures him and is therefore unconstitutional when the unfavorable

position in which he finds himself is due to his refusal and failure to obey another law? One cannot assert a failure to comply with one law as a defense to a suit based upon another. The trustee's failure to follow the specific mandates of Section 124a Title 28, U. S. C. A. is the sole ground for his being able to show he is injured. The petitioner cannot agree with the Circuit Court of Appeals and asks this Court to exercise its supervisory powers and correct the wrong which has been inflicted.

The Court by its decision has sanctioned the failure of bankrupts to comply with both State and Federal Laws. It has reached a wrong result based upon an erroneous order of a Referee. It has exempted a bankrupt estate from taxation. It has defeated the whole purpose of the Federal Social Security Act which, by inviting the States to pass unemployment compensation laws and allowing credit against the Federal tax, has indirectly made it possible for unemployed workers to obtain benefits from a fund which consists of contributions paid by employers.

2.

The Court erred in failing to give effect to Section 6 (C) (d) of the Missouri Unemployment Compensation Law, (Laws of Missouri, 1937, p. 587, quoted in Appendix, p. 40).

This section specifically levies a tax in addition to any tax which may be levied under 6 (A) (1), quoted at page 16, so that the actual tax payment due Missouri must equal 90% of the tax levied under Title IX of the Federal Social Security Act. This tax cannot be said to be retrospective in operation. It is not based upon the payment of wages payable for employment prior to June 17, 1937. Its obvious purpose is to perfect the coordinated scheme which the Federal Act visualizes. The Legislature wanted to make sure that Missouri workers received the full benefits provided by the Unemployment Compensation Law. The Federal tax provides for 90% credit. The Federal Government pays no benefits to workers. Benefits are paid from the 90% paid to the States. Both the Federal Government and the State are anxious to see that this 90% is paid to the State. The petitioner urges upon this Court that there is no possibility of the appellee avoiding the payment of this tax for it has accrued

under either Section 6 (A) (1) or 6 (C) (d) of the Law and the United States Circuit Court has erred in reducing petitioner's tax claim by the amount of $530.09.

3.

The Court erred in failing to order the payment of interest.

Section 15 (a), Laws of Missouri, 1937, p. 598, provides that:

> "Contributions unpaid on the date on which they are due and payable * * * shall bear interest at the rate of one per centum per month from and after such date until payment plus accrued interest is received by the Commission. * * *"

The petitioner feels that this Court has expressed its opinion in regard to the payment of interest in bankrupt cases in the case of *United States* vs. *Childs, Trustee in Bankruptcy of the J. Menist Company, Incorporated*, 266 U. S. 304, 69 L. Ed. 299, 45 S. Ct. 110. Since the facts and the interest rate in the Childs case are comparable to those in the instant case, the petitioner quotes from this decision, l. c. 309:

> "We are unable to concur" (referring to the decision of the Referee that the statutory provision for interest amounted to a penalty and relieving the estate in bankruptcy from the payment thereof, which decision was affirmed by the District Court) "it makes the rate of interest that of a particular locality, differing with the locality—in N. Y. as said by the Government 6%, in the Middle West 8% and on the Pacific Coast 10%—and abridges or controls a federal statute by a local law or custom, and takes from it uniformity of operation. Besides, the federal statute is precise, and it is made peremptory by the distinction between 'penalty' and 'interest', and if it may be conceded that the use of the latter word would not save it from condemnation if it were in effect the former, it cannot be conceded that 1% per month—12% per year—gives it that illegal effect, certainly not against legislative declaration that is within the legislative power, there being no ambiguity to resolve. * * * "

The Circuit Court of Appeals, Seventh Circuit, in the case of *In re Martin*, 75 Fed. (2d) 618, and the Circuit Court of Appeals, Second Circuit, in the case of *In re Semon*, 11 Fed. Supp. 18, 80 Fed. (2d) 81, arrived at the same conclusion.

The petitioner maintains that "Interest" is charged by the Missouri Law solely in recognition of the use of money unpaid to the State. The rate of one per cent per month has been upheld as reasonable in the above-mentioned cases. The Circuit Court in its decision points out the fact that the claim arose out of operations carried on under the supervision of the court and the fact that the assets are inadequate to pay the principal amount of the claims allowed as costs of administration. The proportionate part of the assets which the petitioner will receive should not be reduced because no claimant will be paid in full. The petitioner is entitled to have its claim allowed in the full amount due.

The Court states that, as a general rule, after property of an insolvent passes into the hands of the Court, interest on claims is not allowable against the estate. It quotes from the case of *Thomas* vs. *Western Car Company*, 149 U. S. 95, 37 L. Ed. 663, 13 S. Ct. 824. "The delay in distribution is the act of the law; it is a necessary incident to the settlement of the estate." The Court failed to recognize that in the Western Car Company case, the Court in its opinion dealt only with general claims. The petitioner's claim is a tax claim. There is no reason for delay in the payment of taxes. Section 124a, Title 28, U. S. C. A., previously quoted at p. 16, states that those appointed to conduct the business shall be subject to State and local taxes the same as if the business were conducted by an individual or a corporation, and necessarily contemplates the payment of the same. The reason for the rule of the Western Car Company case is defeated where the claim is for taxes. The Court in the case of *In re Kallok*, 147 Fed. 276, explained in detail why interest should be paid on tax claims but should not be paid on other claims.

The Court in its decision made the following statements: l. c. 277.

> "The contention of the Trustee rests entirely upon the ground that public taxes constitute a claim against the bankrupt estate to be paid with other claims in the ordinary course of administration. As other claims are not

> permitted to draw interest after the adjudication it is, therefore, contended that the amount of the public demand for taxes is subject to the same restriction. * * * "There are two reasons why ordinary claims of creditors are not permitted to draw interest subsequent to the adjudication. First, it is important that the proportionate interest of the several creditors in the estate be ascertained and fixed. If interest were to accrue, however, after the adjudication, the amount of the several claims would vary from time to time, according to their respective rates of interest and the proportionate share of the several creditors would be subject to constant adjustment. The second reason is the convenience of administration. If, at the declaration of every dividend, a new basis of apportionment were required, depending upon varying rates of interest, the administration of the estate would be seriously complicated. In the case of public taxes neither of these reasons has any application because they do not share the estate with the claims of private creditors. * * *"

The Circuit Court cites the case of *American Iron and Steel Manufacturing Company* vs. *Seaboard Air Line Ry.*, 233 U. S. 261, 58 L. Ed. 949, 34 S. Ct. 502, in support of its finding that interest should not be paid where the assets are insufficient to pay the principal amount of claims allowed. The Circuit Court failed to mention that the Court did allow interest on a debt for goods from the expiration of credit until payment. Any statements to the contrary were merely dictum. Furthermore, the case dealt with general claims and not tax claims, and was decided before Section 124a, Title 28, U. S. C. A. was enacted.

The petitioner is asking only for interest and not penalties. However, in the recent case of *Boteler* vs. *Ingels*, 308 U. S. 57, 84 L. Ed. 20, 60 S. Ct. 29, this Court held that even fees and penalties which come due while a trustee is operating the business should be paid, since if such were not the case: l. c. 61.

> "a state would thus be accorded the theoretical privilege of taxing businesses operated by trustees in bankruptcy on an equal footing with all other businesses, but would

be denied the traditional and almost universal method of enforcing prompt payment."

Surely a court which allows fees and penalties will not deny the payment of interest as provided under the statute.

If the Court should find that interest should not be paid at the rate provided for by the statute, the petitioner respectfully requests the Court to find that interest should be allowed at the rate of 6%.

New York vs. *Jersawit*, 263 U. S. 493, 68 L. Ed. 405, 44 S. Ct. 167, distinguished in the Childs case;

In re *Pressed Steel Car Company of New Jersey*, 100 Fed. (2d) 147.

4.

The Court erred in refusing to determine whether or not contributions exacted under the Missouri Unemployment Compensation Law are taxes within the meaning of the Bankruptcy Act and entitled to priority because Section 124a, 28 U. S. C. A. directs payment.

The Court states that it was unnecessary in this proceeding to determine whether or not contributions under the Missouri Unemployment Compensation Law is a tax because the petitioner's claim has been allowed as an administrative expense and the petitioner has, therefore, not been prejudiced. The petitioner concedes that its claim was properly allowed as an administrative expense. However, debtors operating under owner-management, a trustee or other fiduciary are liable for the payment of taxes as they accrue.

28 U. S. C. A., Section 124a;

Board of Directors, etc. vs. *Kurn*, 98 Fed. (2d) 394 (C. C. A.—8, 1938);

Hennepin County vs. *M. W. Savage Factories*, 83 Fed. (2d) 453 (C. C. A.—8, 1936); Certiorari denied, 299 U. S. 555;

Thompson vs. *State of Louisiana*, 98 Fed. (2d) 108 (C. C. A.—8, 1938).

They are not required to pay general claims. The petitioner contends that if contributions are taxes, Section 124a, Title 28, U. S. C. A. is applicable. Otherwise, it is not.

The petitioner contends that interest accrues on taxes from the due date until date of payment, whereas it has been held that they do not accrue on general claims after the filing of the petition.

In re Kallock, 147 Fed. 276;
Thomas vs. *Western Car Co.*, 149 U. S. 95, 37 L. Ed. 663, 13 S. Ct. 824.

Therefore, your petitioner is entitled to have (and the lower court erred in refusing to determine) determined whether these contributions claimed are taxes. While the lower court disclaimed any determination of the issue, the only legal foundation for the lower court's decision is that contributions are not taxes, for then they could properly be pro-rated with other general creditors' claims as administrative expenses, and interest could properly be denied.

The Circuit Court in refusing to pass upon this question has left the way clear for lower courts to classify the petitioner's claim as a general claim rather than a tax claim in every case which is now pending and every case which will arise in any District Court in Missouri. It has in effect stated that the entire amount of the tax due under Title IX of the Federal Act shall be paid prior to the payment of the State's claim for contributions, since it does not deny that the federal tax is a tax and priority claims are paid in full before any part of general claims are paid. It has in effect defeated the whole purpose of the Social Security program. The Federal Act and the State Law were intended to operate in harmony, one with the other. They should be so construed.

This Court has never passed upon the question of whether or not contributions exacted under the Missouri Unemployment Compensation Law or under the unemployment compensation law of any other state are taxes within the meaning of the Bankruptcy Act. It is of vital importance, not only in the case at hand, but in a large percentage of the bankruptcy cases in every state, that this question be definitely decided by this Court.

In cases where the question of priority under the Bankruptcy Act was not involved, this Honorable Court has found that contributions exacted under the Unemployment Compensation Laws of Alabama and Arkansas are taxes. In the case

of *Carmichael* vs. *The Southern Coal & Coke Company*, 301 U. S. 495, 508, the following statement is found:

> "*In Beeland Wholesale Company* vs. *Kaufman*, 234 Ala. 249, 174 S. 516, supra, the Supreme Court of Alabama held that the contribution which the statute exacts of employers are excise taxes laid in conformity to the Constitution and Laws of the state. While the particular name which a state court or legislature may give to a money payment commended by its statute is not controlling when its constitutionality is in question, * * * we see no reason to doubt that the present statute is an exertion of the taxing power of the State. * * * Taxes, which are but the means of distributing the burden of the cost of government, are commonly levied on property for its use, but they may likeise be laid on the exercise of personal rights and privileges. As the present levy has all the indicia of a tax, and is of a type traditional in the history of Anglo-American legislation, it is within state taxing power, and it is immaterial whether it is called an excise or by another name."

The Carmichael case was followed by the case of *Buckstaff Bath House Company* vs. *McKinley*, 198 Ark. 91, 127 S. W. (2d) 802, which case arose under the Unemployment Compensation Law of Arkansas. The decision of the Supreme Court of Arkansas reads in part as follows: l. c. 99.

> "The Legislature has the right to require that employers make contributions in the manner provided by the Act 155. The National Social Security Act denominates the contribution 'an excise tax levied on employers.' That the required payment is referred to in our Act 155 as a 'contribution' is of no significance. It is a compulsory contribution and therefore a tax."

The case was submitted to this Court on writ of certiorari. 308 U. S. 358, 60 S. Ct. 279, 84 L. Ed. 242. The decision portrays a true picture of the Social Security program, l. c. 363:

> "That petitioner is subject to the Social Security Act is extremely relevant to the solution of the problem at hand. For that Act laid the foundation for a cooperative endeavor between the states and the nation to meet a

grave emergency problem. As pointed out by this Court in *Steward Machine Company vs. Davis, supra*, p. 588, that Act was an attempt to find a method by which the states and the federal government could 'work together to a common end'. Prior thereto many states had held back through alarm lest, in laying such a toll upon their industries, they would place themselves in a position of economic disadvantage as compared with neighbors or competitors. *Id*, p. 588. The Act was designed therefore to operate in a dual fashion—state laws were to be integrated with the Federal Act; payments under state laws could be credited against liabilities under the other. That it was designed so as to bring the states into the cooperative venture is clear. The fact that it would operate though the states did not come in does not alter the fact that there were great practical inducements for the states to become components of a unitary plan for unemployment relief. It is this invitation by the Congress to the states which is of importance to the issue in this case. For certainly, under the coordinated scheme which the Act visualizes, when Congress brought within its scope various classes of employers it in practical effect invited the states to tax the same classes. Hence, if there were any doubt as to the jurisdiction of the states to tax any of those classes it might well be removed by that invitation, for in absence of a declaration to the contrary, it would seem to be a fair presumption that the purpose of Congress was to have the state law as closely coterminous as possible with its own. To the extent that it was not, the hopes for a coordinated and integrated dual system would not materialize.

"Hence it is our view that on the facts of this case, Congress has given Arkansas implied authority to tax petitioner under its Unemployment Compensation Law since the Congress has included under the Social Security Act employers such as petitioner. Clear evidence of a contrary intention would, of course, negative the existence of the implied authority. But here there is none. That conclusion is strengthened by the exemption of certain classes of employers from the sweep of the Federal Act. Thus, the exclusion of federal instrumentalities from the scope of the Federal Act, and hence from the comple-

mentary state systems, emphasizes the purpose to exclude from this statutory system only that well defined and well known class of employers who have long enjoyed immunity from state taxation. Had it been desired to exempt the equally well known class, of which petitioner is a member, so as to save it from reciprocal state systems, it would seem that an equally clear exception would have been made."

However, these decisions do not involve contributions levied under the Missouri Law. The questions involved did not arise under the Bankruptcy Act. It is imperative, if the Missouri Unemployment Compensation Law is to function and operate as its framers intended, that this Court decide that contributions levied under the Missouri Act are taxes within the meaning of the Bankruptcy Act.

The Courts in various states have held that contributions levied under their unemployment compensation laws are taxes:

Beeland Wholesale Company vs. *Kaufman*, 234 Ala. 249, 174 So. 516;

Buckstaff Bath House Company vs. *McKinley*, 198 Ark. 91, 127 S. W. (2d) 802;

Texas Company vs. *Leon L. Wheeless*, 185 Miss. 799, 187 So. 880;

Fidelity-Philadelphia Trust Company vs. *Lewis G. Hines*, 10 Atl. (2d) 553.

Whether or not contributions are taxes has never been a question directly in issue in a case decided by the Supreme Court of Missouri. However, in a decision handed down on June 28, 1940, not yet reported, in the case of *Murphy, Sr., et al.* vs. *Hurlbut Undertaking and Embalming Company*, the court stated:

"What our State Act denominates as contributions, the Federal Act (42 U. S. C. A. Sec. 1101) calls an *excise tax*."

By this language the court indicated it would hold that contributions are taxes if the question comes before it.

Various lower courts have handed down decisions, some of which have been reported, construing unemployment

compensation contributions as taxes within the meaning of the Bankruptcy Act.

In re Oshkosh Foundry, 28 Fed. Supp. 412 (U. S. D. C. Wis. 1939);
In re Mid-America, 31 Fed. Supp. 601, (U. S. D. C. Ill. 1939);
In re Sixty-Seven Wall Street Restaurant Corporation, 23 Fed. Supp. 672, (U. S. D. C. N. Y. 1938);
In re Lambertville Rubber Company, 27 Fed. Supp. 897, (U. S. D. C. N. J. 1939);
In re Wilsonite Corporation, 28 Fed. Supp. 913 (U. S. D. C. N. J. 1939);
In re Lechtman Printing Company, Prentice Hall No. 29595, set out in appendix at p. 43, (U. S. D. C. Mo. 1939).

Other district courts have handed down contrary decisions:

In re Mosby Coal and Mining Company, 24 Fed. Supp. 1022 (U. S. D. C. Mo. 1938);
In re DeGraw Motor Co. (U. S. D. C. Neb. 1938) not officially reported;
In re William Akers, Inc., 31 Fed. Sup. 900.

The petitioner insists that, in view of the conflicting decisions which are being handed down by the various district courts, this question should be settled by the court of highest authority.

The petitioner maintains that contributions demanded under the provisions of the Missouri Unemployment Compensation Law fall within the taxing power of the State of Missouri as set out by Section 3, Article X of the Constitution of Missouri (Mo. Stat. Ann. Vol. 15, page 733) which provides:

> "Taxes may be levied and collected for public purposes only. They shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax and all taxes shall be levied and collected by general law."

Unemployment is unquestionably a risk to the safety and welfare of the people and a threat to our economic structure. When the General Assembly enacted a law providing for the payment of benefits to the unemployed it also provided for the general welfare of all its people. "General welfare" and "public purpose" are one and the same. This well established doctrine is expressed by the courts in the following cases.

Charles G. Steward Machine Company vs. *Davis*, 301 U. S. 548, 81 L. Ed. 1279, 57 S. Ct. 883;

Helvering et al. vs. *Davis*, 301 U. S. 619, 672, 81 L. Ed. 1307, 57 S. Ct. 904;

In re Oshkosh Foundry Company, 28 Fed. Supp. 412;

State ex rel. Gilpin vs. *Smith*, 96 S. W. (2d) 40, 339 Mo. 194 (Sup. Ct.);

Jennings vs. *City of St. Louis*, 58 S. W. (2d) 979, 332 Mo. 173.

The Circuit Court of Appeals intimated that the act of the legislature gave contributions a subordinate position in respect to priority. This suggestion was founded upon Section 15 (c) of the Act of June 17, 1937, which read:

> "In the event of any distribution of an employer's assets pursuant to an order of any court under the laws of this state, including any receivership, assignment for benefit of creditors, adjudicated insolvency, composition, or similar proceeding, contributions then or thereafter due shall be paid in full prior to all other claims except taxes and claims for wages of not more than $500.00 to each claimant earned within six months of the commencement of the proceeding. In the event of an employer's adjudication in bankruptcy, judicially confirmed extension proposal, or composition, under the Federal Bankruptcy Act of 1898, as amended contributions then or thereafter due shall be entitled to such priority as is provided in Section 64 (b) of that Act (U. S. C., title XI, sec. 104 (b)), as amended."

Why the legislature stated that in some instances contributions should be paid in full prior to all other claims except taxes, we do not know, because the law was amended in 1939 and this paragraph was omitted (Laws of Missouri, 1939, p. 887).

Certainly a state has the right to give priority to certain taxes over others if it so desires. However, in the case of bankruptcy the Legislature stated that contributions should be given the priority as provided in section 64 (b) 11 U. S. C. A. 104 (b) of the Bankruptcy Act. At the time the Missouri Unemployment Compensation Law was passed, Section 64 (b) gave priority to both taxes and debts due to the States (Appendix p. 38). Therefore that is no indication that the State did not treat and consider the contributions as taxes.

The fact is immaterial that Section 15 (b) (Appendix p. 41) of the original Act and Section 15 (h) (Appendix, p. 42) of the amended Act provide that if any employer defaults in payment of any contributions, the amount due shall be collected by civil suit. It makes no difference that some taxes may be collected in a different manner from other taxes. A state can adopt any method it chooses to collect the tax which it exacts. As this court in the case of *State of New Jersey* vs. *Anderson*, 203 U. S. 483, 51 L. Ed. 284, 27 S. Ct. 137, stated:

"The form of procedure cannot change their character."

Neither can any importance be attached to the fact that throughout the Act the tax is designated as a contribution. The character of an exaction can't be changed by changing its name. Contributions paid under this Act are compulsory payments made for a public purpose. It matters not that only a certain class of employing units pays the tax, that only certain types of workers receive the money payments or that the money collected is kept separate and apart from other taxes. (Section 12 (a) Appendix p. 41.) This tax comes within the definition of a tax as is stated in 61 C. J. 68:

> " * * * the essential characteristics of a tax are that it is not a voluntary payment or donation, but an enforced contribution, exacted pursuant to legislative authority * * * ."

The following paragraph quoted from the case of *State of New Jersey* vs. *Anderson*, 203 U. S. 483, 51 L. Ed. 284, 27 S. Ct. 137, summarizes petitioner's position in respect to the contributions levied by the unemployment compensation law, l. c. 492:

"The language of the Act (referring to Section 64 (a) of the Bankruptcy Act) is very broad and includes all taxes. * * * As was said by Mr. Justice Field, speaking for the Court in *Meriwether* vs. *Garrett*, 102 U. S. 472, 513: 'Taxes are not debts. Taxes are imposts levied for the support of the Government, or for *some special purpose authorized by it.* The consent of the taxpayer is not necessary to their enforcement. They operate in invitum. Nor is their nature affected by the fact that in some States * * * an action of debt may be instituted for their recovery. The form of procedure cannot change their character.'" (Underscoring and parentheses supplied.)

See also

Macallen Company vs. *Massachusetts*, 279 U. S. 620, 625, 73 L. Ed. 874, 49 S. Ct. 432;

Houck vs. *Little River District*, 239 U. S. 254, 60 L. Ed. 266, 36 S. Ct. 58.

Contributions under the Missouri Law are taxes and are considered and treated as such in all respects. The decision of the Circuit Court of Appeals was proper in allowing petitioner's claim as an administrative expense, but petitioner respectfully asserts that since the enactment of Section 124a of Title 28 U. S. C. A., taxes accruing during administration are entitled to a preference over other administrative expenses for the reason that Section 124a requires payment thereof as though the trustee were an ordinary individual or corporation. Reasonable effect cannot be given to Section 124a unless it is recognized that such payments to the State are required to be made by an individual or corporation as a priority over other claims. Therefore, we respectfully urge that the court should have directed the payment in full of the taxes accruing during administration as a priority over other claims accruing during administration.

The court in the case of *In re Otto F. Lange Company*, 159 Fed. 586, well stated the position which should be taken in determining whether or not moneys due to the states are taxes within the meaning of the Bankruptcy Act: l. c. 588.

"It is obvious that the word 'tax' as used in the Bankruptcy Act is not used in any restricted or narrow sense, but is used broadly to include all obligations imposed by

the State and general governments under their respective taxing or police powers for governmental or public purposes. That a tax so imposed may not be a general property tax does not deprive it of the character of a tax. Many taxes are imposed under the name of license fees, franchise taxes, or taxes for special purposes under some other name, and are therefore special taxes; but they are nevertheless taxes imposed for a public purpose, no matter what the name under which they are levied or imposed, and are clearly within the meaning of the term 'tax' as used in the Bankruptcy Act. Nor is the meaning of the word 'tax' as used in the Bankruptcy Act to be determined by the state courts so as to exclude the federal courts. That is a federal statute, the interpretation and meaning of which is to be determined ultimately by the federal Courts."

The foregoing cited cases clearly indicate that the term "taxes," as used in the bankruptcy statutes, is to be broadly and all inclusively construed. We respectfully assert that this same broad and all inclusive construction should be given to the term "taxes" as used in Section 124a, Title 28, U. S. C. A. When that Section is so construed, the only logical result can be that petitioner's claim is entitled to priority over other administrative expenses and that interest should have been ordered paid as provided for in the statute.

VII.

Conclusion.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, by granting a writ of certiorari and thereafter reviewing and reversing the decision of the Circuit Court of Appeals.

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